

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE NO. 2007-136
Rogers & Callcott Laboratory Services)	
)	
Materials Management Office)	POSTING DATE:
RFP No. 08-S7561)	
Drinking Water Analysis Monitoring for)	DECEMBER 20, 2007
Trihalomethanes and Haloacetic Acid)	
<u>Dept. of Health & Environmental Control)</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Rogers & Callcott Laboratory Services (R&C). With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure drinking water analyses for the South Carolina's public water system monitoring for trihalomethanes (TTHM) and haloacetic acid (HAA5) on behalf of the Department of Health and Environmental Control (DHEC). R&C protested MMO's award to Environmental Engineering & Technology, Inc. (EE&T) alleging that 1) "EE&T has never had an onsite inspection by the S.C. certification personnel", 2) "EE&T has overstated its sample handling capabilities", 3) "EE&T is verifying 10% or less of the samples analyzed . . . EE&T is not meeting S.C. certification requirements as stated in their proposal", and 4) "EE&T is using GC Electron Capture to analyze South Carolina's TTHM samples" which produces inferior results.

In a pre-hearing response, EE&T responded to R&C's four allegations that 1) "South Carolina Laboratory Certification personnel are not required to conduct on-site audits of out-of-state labs, and instead, in compliance with SC Regulations (61-81) conduct an evaluation of the lab's home state audit", 2) "We have more than one GC available for HAAs so the math in the protest letter is invalid", 3) "there is no mandatory quality control regarding the number of samples that are to be confirmed", and 4) "[t]he methods we utilize are accepted methods by the South Carolina DHEC and EPA, as required by the solicitation."

In order to resolve the matter, the CPO conducted a hearing December 10, 2007. Appearing before the CPO were Sam Avery, Jr., President, representing R&C; David Cornwell, Ph.D., P.E., President, representing EE&T; Julie McIntyre, Esq., representing DHEC, and John Stevens, State Procurement Officer, representing MMO.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 30, 2007, MMO issued the RFP. [Ex. 1]
2. On August 20, 2007, MMO issued Amendment No. 1. [Ex. 2]
3. On August 29, 2007, MMO issued Amendment No. 2. [Ex. 3]
4. On September 10, 2007, MMO issued Amendment No. 4. [Ex. 4]
5. On September 26, 2007, MMO opened the proposals received. [Ex. 5]
6. On October 29, 2007, after evaluation by a team of DHEC experts, MMO posted a notice of intent to award to EE&T. [Ex. 10] The composite scores were:

<u>Offeror</u>	<u>Total Score</u>
EE&T	289.79
MWH Labs	223.00
R&C	220.30

7. On November 8, 2007, the CPO received the protest.

CONCLUSIONS OF LAW

In protest issue no. 1, R&C alleged, "EE&T has never had an onsite inspection by S.C. certification personnel to verify conformity to the S.C. Department of Health and Environmental Controls Laboratory Certification Criteria for drinking water."

EE&T responded, “South Carolina Laboratory Certification personnel are not required to conduct on-site audits of out-of-state labs, and instead, in compliance with SC Regulations (61-81), conduct an evaluation of the lab’s home state audit.” DHEC officials who actually perform the laboratory certification function for the State of South Carolina confirmed EE&T’s position. Carol Smith, Director of Lab Certification for DHEC, acknowledged that R&C’s factual allegation is correct, but stated that DHEC accepts certifications of laboratories from other states, in this case Virginia, through reciprocal agreements, a method which was suggested some years ago by the federal Environmental Protection Agency (EPA). DHEC’s recognition of another state’s certification is addressed in the RFP, which reads, “An on site evaluation may be required of Offeror’s laboratories that have not had an on-site visit performed by the South Carolina DHEC Laboratory Certification Program or a certifying authority recognized by the SCDHEC program.” [Ex. 1, p. 11, Inspection and Evaluation] [Emphasis added] Bruce Bleau, Manager, Drinking Water Compliance Monitoring Section, of DHEC testified that Ms. Smith provided the list of certified laboratories, which were published in the RFP. [Ex. 1, p. 28] EE&T was listed in the RFP, and is in fact, certified to conduct drinking water analyses in South Carolina. [Ex. 1, p. 28, Certified Laboratories]

In protest issue no. 2, R&C alleged “EE&T has overstated its sample handling capabilities” to perform analysis of 300 TTHM/HAA5 samples per week. Specifically, R&C points to the statement in EE&T’s proposal that “EE&T lab currently has the capability to consistently and accurately receive, analyze, and report the data in hard and electronic format in a timely manner for approximately 300 TTHM/HAA samples per week.” [EE&T proposal, p. 18] R&C accused EE&T of fraudulent misrepresentation (lying) in order to gain the contract arguing that EE&T cannot possibly conduct analysis of 300 TTHM/HAA5 samples per week.

EE&T responded that the statement regarding its testing prowess is accurate, as EE&T possesses more than one testing instrument. MMO noted that the solicitation guaranteed no minimum number of samples, but estimated 300 per quarter, not 300 per week anyway. No one challenged EE&T’s capability to

complete 300 tests per quarter and no misrepresentation of the weekly testing ability of EE&T was established.

In protest issue no. 3, R&C alleged, “EE&T is verifying 10% or less of the samples analyzed . . . EE&T is not meeting S.C. certification requirements as stated in their proposal.”

EE&T responded that it utilizes different testing methods than R&C; both of which are authorized by EPA. According to EE&T and confirmed by DHEC, EE&T’s methods comply with EPA requirements for accepted testing methods and are certified by DHEC. EE&T explained further that verification tests are typically performed to determine if interferences are present in the samples. They argued that verification testing is normally conducted to confirm a finding - to test the test. In this case, however, because all public water authorities utilize detergents in the purification process, it is assumed that interferences will be found in the samples. Therefore, they argue that verification is of minimal importance in these particular protocols.

In protest issue no. 4, R&C argued that its testing methods are superior to those employed by EE&T alleging “[t]he methods we utilize are accepted methods by the South Carolina DHEC and EPA, as required by the solicitation.”

EE&T and DHEC responded that the methods employed by EE&T are accepted by the State of South Carolina. The RFP did not require specific testing methods. Rather, it identified certified laboratories that were authorized to bid. The testing methods of all bidders are considered during the certification process. EE&T was listed in the RFP as an authorized bidder.

DETERMINATION

EE&T is certified in its home state of Virginia, a certification recognized by the State of South Carolina in accordance with SC Reg. 61-81, which reads, “Laboratories, located in other states, which have been certified under an equivalent program, as determined by the State Environmental Laboratory Certification Officer, are eligible for certification under the Regulation.” According to testimony of DHEC

officials, EE&T is indeed certified in South Carolina through a reciprocal agreement with the State of Virginia. MMO listed EE&T in the RFP as one of seven certified laboratories eligible to bid. EE&T's eligibility to bid was not protested within fifteen days after MMO's release of the RFP. Therefore, it is untimely raised here. [S.C.Code Ann. § 11-35-4210(1)]

There is no evidence that EE&T misrepresented its testing capabilities in its proposal. True, they claimed to be able to test up to 300 samples per week. At the hearing, Dr. Cornwell explained that statement is based upon the total capacity of EE&T. In actuality, it bears no resemblance to the real testing burden placed upon the contractor, which is "approximately 300 samples each quarter." [Ex. 1, p. 11, Number of Samples]

Regarding misrepresentations by bidders, the Procurement Review Panel has ruled that a protestant must not merely prove a misrepresentation (which R&C has not done successfully here), but also prove that the misrepresentation was made in bad faith or had a material influence on the award. Protest of PS Energy, Case No. 2002-9, 2002 WL 31955058 (2002). See, also, Blue and Gold Fleet, L.P. v. U.S., 492 F.3d 1308, 1317 (Fed.Cir. 2007) (misrepresentations, if proven, must be both material and relied upon in the award of the contract to the government's prejudice). In this case, conflicting testimony prevents a determination that EE&T even misrepresented its capacity. The CPO finds no basis to conclude that EE&T made a material or bad faith misrepresentation to the State that had a material influence on the award.

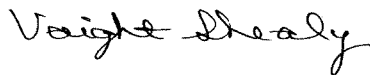
At the heart of much of the protest, R&G offers allegations that directs challenges to the state's certification of EE&T and its testing methods. Under state regulation 61-81, the "State Environmental Laboratory Certification Officer", not the CPO, certifies laboratories. DHEC is the designated administrative authority for certification of laboratories, not the CPO. Any challenge to EE&T's certification should be processed through appropriate channels with DHEC. R&C argued that its testing methods were better. Testing methods are also under the jurisdiction of DHEC, as the certification authority in South Carolina. The RFP did not require that bidders employ any single testing method. Instead, it listed certified

laboratories, including EE&T, that were authorized to bid. R&C could have protested under S.C.Code Ann. § 11-35-4210 the State's allowance that EE&T could bid within fifteen days of the release of the RFP, but R&C failed to do so. Therefore, any allegation regarding EE&T's certification or its testing methods is untimely filed at this point. To the extent the CPO might have had jurisdiction in this matter is not an issue due to R&C's failure to protest the solicitation within the fifteen days provided by statute.

EE&T is certified by the State's certification authority to conduct this work. Ms. Smith, who manages the state's laboratory certification program testified both R&C and EE&T are "very good laboratories."

Under the nomenclature offered by the code, R&C alleged that EE&T was nonresponsive; that EE&T violated the bidding requirements, and was nonresponsive; and that EE&T is incapable of performing the work under this contract. However, R&C has not shown that EE&T took exception with any requirement of the RFP. Further, R&C has not shown that EE&T is not certified, and therefore not eligible to receive the contract. Of note is the fact that EE&T is the incumbent contractor, having performed the contract successfully for the past 5 years.

The protest is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

December 20, 2007

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).